

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BOILERMAKERS NATIONAL ANNUITY)	
TRUST FUND, on behalf of itself and all)	NO. 2:09-CV-00037-MJP
others similarly situated,)	
)	FEDERAL DEPOSIT INSURANCE
Plaintiff,)	CORPORATION'S MOTION TO DISMISS
)	FOR LACK OF SUBJECT MATTER
v.)	JURISDICTION
)	
WAMU MORTGAGE PASS THROUGH)	ORAL ARGUMENT REQUESTED
CERTIFICATES, SERIES 2006-AR1, <i>et al.</i> ,)	
)	Note on Motion Calendar:
Defendants.)	March 6, 2009
)	

The Federal Deposit Insurance Corporation as Receiver for Washington Mutual Bank, a depository institution ("FDIC as Receiver"), through undersigned counsel and pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12 U.S.C. § 1821(d)(13)(D), hereby files this motion to dismiss, for lack of subject matter jurisdiction, the claims of plaintiff Boilermakers National Annuity Trust Fund ("Boilermakers") against the FDIC as Receiver. As grounds for its motion, the FDIC as Receiver states as follows:

Introduction

1. Boilermakers filed its lawsuit after the FDIC was appointed receiver for Washington Mutual Bank, but before it had even filed a claim in the receivership, much less

1 exhausted its administrative remedies. Pursuant to 12 U.S.C. § 1821(d)(13)(D), neither this
 2 Court nor any other court has jurisdiction over Boilermakers' claims against the FDIC as
 3 Receiver for Washington Mutual Bank until Boilermakers' has exhausted the claim process
 4 established by the FDIC.

5 2. As the Ninth Circuit Court of Appeals has explicitly and dispositively held:
 6 "Section 1821(d)(13)(D) strips all courts of jurisdiction over claims made outside the
 7 administrative procedures of section 1821." *Henderson v. Bank of New England*, 986 F.2d
 8 319, 320 (9th Cir.), *cert. denied*, 510 U.S. 995 (1993). Requiring exhaustion of the FDIC's
 9 administrative remedies fulfills the purpose of the Financial Institutions Reform, Recovery
 10 and Enforcement Act ("FIRREA"), 12 U.S.C. § 1821(d)(3)–(10) & (13), "to ensure that the
 11 assets of a failed institution are distributed fairly and properly among those with valid claims
 12 against the institution' and promptly to 'wind up the affairs of failed banks.'" *McCarthy v.*
 13 *Federal Deposit Ins. Corp.*, 348 F.3d 1075, 1079 (9th Cir. 2003) (quoting *Freeman v. Federal*
 14 *Deposit Ins. Corp.*, 56 F.3d 1394, 1401–02 (D.C. Cir. 1995)).

15 3. Boilermakers having failed to comply with the statutorily mandated
 16 administrative process, the FDIC as Receiver respectfully requests that Boilermakers' claims
 17 against it be dismissed for lack of subject matter jurisdiction.

18 **Procedural Posture**

19 4. The FDIC is a corporation organized and existing pursuant to an Act of
 20 Congress of the United States known as the Federal Deposit Insurance Act, 12 U.S.C. § 1811,
 21 *et. seq.*, with its principal place of business located in Washington, D.C.

22 5. On September 25, 2008, the Office of Thrift Supervision declared Washington
 23 Mutual Bank insolvent and appointed the FDIC as its receiver. Pursuant to 12 U.S.C.
 24 § 1821(c)(3)(A)(ii), the FDIC accepted the appointment as receiver of Washington Mutual
 25 Bank. A copy of the documentation reflecting the September 25, 2008 appointment of the
 26 FDIC as Receiver for Washington Mutual Bank by the Office of Thrift Supervision is
 27 attached hereto as Exhibit A.
 28

6. In accordance with 12 U.S.C. § 1821 (d)(3)(B), the FDIC as Receiver published a Notice, first published on October 1, 2008, advising creditors of Washington Mutual Bank to present all claims by the claims bar date of December 30, 2008, consistent with 12 U.S.C. § 1821(d)(3). A copy of the published Notice is attached as Exhibit B.

7. On or about January 12, 2009, more than three months after the FDIC was appointed receiver of Washington Mutual Bank, Boilermakers filed the complaint in this action against Washington Mutual Bank.

8. On January 21, 2009, Boilermakers filed a purported "Declaration of Service of Summons in a Civil Action," which purports to show service upon defendant Washington Mutual Bank. A copy is attached as Exhibit C. The Declaration claims to have served a "Reg Agent for Corp.," but does not identify the "Corp." to which it refers. Of course, Washington Mutual Bank was a federally chartered bank and a depository institution, not a "corporation." Moreover, service could not properly have been made on Washington Mutual Bank in January of this year because 12 U.S.C. § 1821(d)(2)(A)(i) provides that the FDIC, as Receiver, succeeds to "all rights, titles, powers and privileges of the insured depository institution," and the FDIC was appointed as receiver in September 2008. Therefore, because the Office of Thrift Supervision ceded all of Washington Mutual Bank's rights to the FDIC, including the right to wind up its affairs, Washington Mutual Bank had ceased to exist and could not be served with process by Boilermakers. *Cf. McAninch v. Wintermute*, 478 F.3d 882, 891 (8th Cir. 2007). The FDIC as Receiver has not been served with the complaint or process in this action.

9. Nevertheless, on February 9, 2009, the FDIC as Receiver moved for substitution as a real party in interest pursuant to Federal Rule 23(c). All parties consented to the motion for substitution. This Court granted that motion on February 11.

ARGUMENT

A. Standard on Rule 12(b)(1) Motion

10. It is a fundamental precept that federal courts are courts of limited jurisdiction. Limits upon federal jurisdiction must not be disregarded or evaded. *Owen Equip. & Erection*

1 *Co. v. Kroger*, 437 U.S. 365, 374, 98 S. Ct. 2396, 57 L.Ed.2d 274 (1978). The plaintiff has
 2 the burden to establish that subject matter jurisdiction is proper. *Kokkonen v. Guardian Life*
 3 *Ins. Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L.Ed.2d 391 (1994).

4 11. A defendant may attack the existence of subject matter jurisdiction not only on
 5 the face of the pleadings, but also with evidence extrinsic to the pleadings. *Mortenson v. First*
 6 *Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (9th Cir. 1979). In such a case, the Court may
 7 rely on evidence extrinsic to the pleadings. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th
 8 Cir. 1989). "No presumptive truthfulness attaches to plaintiff's allegations, and the existence
 9 of disputed material facts will not preclude the trial court from evaluating for itself the merits
 10 of jurisdictional claims." *Thornhill Publ'g Co. v. General Tel. Elec., Inc.*, 594 F.2d 730, 733
 11 (9th Cir. 1979) (quoting *Mortenson*, 549 F.2d at 891).

12 B. The Complaint Against FDIC as Receiver Should Be Dismissed for Lack of Subject
 13 Matter Jurisdiction.

14 12. The Court should dismiss Boilermakers' claims against the FDIC as Receiver
 15 because it currently lacks jurisdiction over these claims. 12 U.S.C. § 1821(d)(13)(D) directs
 16 that no court shall have jurisdiction over any claim or action for payment from, or any action
 17 seeking a determination of rights with respect to, the assets of any depository institution for
 18 which the FDIC has been appointed receiver unless the plaintiff has first exhausted its
 19 administrative remedies.

20 Except as otherwise provided in this subsection, **no court shall have**
jurisdiction over—

21 (i) any claim or action for payment from, or any action seeking a
 22 determination of rights with respect to, the assets of any depository
 23 institution for which the Corporation has been appointed receiver,
 24 including assets which the Corporation may acquire from itself as
 25 such receiver; or

26 (ii) any claim relating to any act or omission of such institution or
 27 the Corporation as a receiver.

28 12 U.S.C. § 1821(d)(13)(D) (emphasis added).

13. Boilermakers' claims constitute claims for payment from, or an action seeking a determination of rights with respect to, the assets of Washington Mutual Bank. Yet Boilermakers has not even initiated, let alone exhausted, its administrative remedies.

14. FIRREA, 12 U.S.C. § 1821(d)(3)–(10) & (13), makes participation in the administrative claim review process a mandatory condition precedent to pursuing claims against the FDIC in court. *See, e.g., Intercontinental Travel Marketing, Inc. v. Federal Deposit Ins. Corp.*, 45 F.3d 1278, 1282–84 (9th Cir. 1994); *Freeman v. FDIC*, 56 F.3d at 1400; *Abbott Bldg. Corp. v. United States*, 951 F.2d 191, 194 n.3 (9th Cir. 1991). No court has jurisdiction over Boilermakers' claims against the FDIC as Receiver until the exhaustion of this mandatory administrative process. *Intercontinental Travel*, 45 F.3d at 1282–83.

15. FIRREA contains no provision granting federal jurisdiction over claims filed after a receiver is appointed but before administrative exhaustion. *Henderson v. Bank of New England*, 986 F.2d at 320 (citing *Meliezer v. Resolution Trust Corp.*, 952 F.2d 879, 882 (5th Cir. 1992)). To the contrary, FIRREA bars judicial review of any non-exhausted claim that is susceptible of resolution through the claims process. *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 391 (3d Cir.), *cert. denied*, 502 U.S. 981 (1991). “Section 1821(d)(13)(D) strips all courts of jurisdiction over claims made outside the administrative procedures of section 1821.” *Henderson*, 986 F.2d at 320. Thus, a claimant *must first file a claim with the FDIC* before a claimant can file suit in district court. Boilermakers has failed to do so.

16. Requiring exhaustion fulfills the purpose of FIRREA “to ensure that the assets of a failed institution are distributed fairly and properly among those with valid claims against the institution’ and promptly to ‘wind up the affairs of failed banks.’” *McCarthy v. FDIC*, 348 F.3d at 1079 (quoting *Freeman v. FDIC*, 56 F.3d at 1401–02). Congress emphasized that the “exhaustion requirement was a key linchpin in achieving the legislative goal of resolving the ‘bulk of claims against failed financial institutions expeditiously and fairly’ through the administrative process without ‘unduly burdening the District Courts.’” *Feise v. Resolution*

1 *Trust Corp.*, 815 F. Supp. 344, 348 (E.D. Cal. 1993) (quoting H.R. Rep. No. 54(1), 101st
2 Cong., 1st Sess., *reprinted in* 1989 U.S.C.C.A.N. 215).

3 17. Because exhaustion of administrative remedies is required pursuant to FIRREA
4 prior to any court having jurisdiction over such a claim and Boilermakers has failed to exhaust
5 its administrative remedies, dismissal is appropriate under FIRREA.

6 **Prayer For Relief**

7 WHEREFORE, on the basis of the foregoing, the FDIC as Receiver for Washington
8 Mutual Bank respectfully requests that this Court dismiss Boilermakers' complaint against the
9 FDIC for lack of subject matter jurisdiction, together with such other and further relief
10 deemed just and proper under the circumstances. A proposed Order has been submitted to the
11 Court.

12 DATED this 12th day of February, 2009.

13 Respectfully submitted,

14 KARR TUTTLE CAMPBELL

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DECLARATION OF SERVICE

I hereby certify that on February 12, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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